employing C, or to cease dealing with C; and (3) A, striking against B, compels D, by threats of strike or boycott, to cease dealing with B. Strikes falling within the first group are generally held to be lawful; those in the second group require justification; and those in the third group constitute illegal means and are generally held to be unlawful.

The recent decisions show important tendencies in the last two classes. The courts are gradually extending the scope of a justifiable object. Indeed there is no certain criterion as to what constitutes justifiable trade competition and where the logical stopping point should be.[18] This must necessarily vary according to the mores of the time. It may be that in the past few years, due to peculiar industrial conditions, the pendulum has been swinging in the direction of the labor unions and is now about to swing back. Yet there are some who think it has not swung far enough. Surely we can expect the decisions to become more nearly uniform and can hope that the question of what constitutes a justifiable object, will be rendered more certain. Whatever conduct will be permitted, will of course operate to limit the doctrine of the right to a free flow of labor and goods.[19]

MUTUAL ASSENT AS AFFECTED BY UNILATERAL MISTAKE

The interesting, though by no means new, question as to whether a contract comes into existence when an offer made by mistake is in terms accepted, was raised in the recent case of *Independent Trading Co. v.*

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on the B railroad and then the employees of the D railroad go out on strike, merely to bring moral pressure to bear on B. Naturally, if we apply the tests suggested in this series of comments, there is no cause of action against such strikers, unless it appear that the employees of D were by reason of affiliation or otherwise acting under compulsion rather than as free agents in declaring their strike. A situation in which E strikes against D to compel D not to trade with B (whose employees A are on strike) has sometimes been called a sympathetic strike. See Darling, *Recent American Decisions and English Legislation Affecting Labor Unions* (1908) 42 AM. L. REV. 200. But such a situation falls within class 2.

[18] This is simply a question of degree. Mr. Justice Holmes has stated that most differences are only of degree, when nicely analyzed. *Rideout v. Knox* (1889) 148 Mass. 268, 372, 19 N. E. 390, 392.

[19] It is possible, too, that the courts will extend a remedy to certain groups, which at the present time have no remedy. Thus A may strike against his employer B to have C discharged. Let us suppose that this occurs in a jurisdiction in which C is given a cause of action against A. *Smith v. Bowen* (1919) 232 Mass. 106, 121 N. E. 814. Then if A causes interference with C, C may sue A. But suppose that B chooses to retain C, why should he not have an action against A? Obviously A is committing a tort against C and it seems that in logic B should be given a remedy in case he suffers harm by resisting A's demands. Take the example of a secondary boycott: A compels D to cease dealing with B. B can restrain such action by A. But suppose D refuses to stop dealing with B, and sues A for interfering? *Karges Furniture Co. v. Amalgamated Union* (1905) 165 Ind. 421, 75 N. E. 877. It is true that few cases come up in this manner, but this may be due to the fact that it is generally recognized that the courts would not grant relief.

Fougera & Co. In that case the plaintiff, over the telephone, asked the defendant for a quotation on 100 pounds of "potassium guaiacol "sulphonate, C. P. white," which had been quoted to him on the same day by several dealers at $30 a pound. Defendant's manager asked for ten minutes' time and said he would call back. This he did; he told the plaintiff the price was $10.50 per pound. Plaintiff told defendant that he would take 100 pounds, to which defendant's manager replied: "Send around your contracts." A writing was sent, on which defendant's agent wrote as follows: "Accepted, E. Fougera & Co., by L. Jacobs."

The article designated in plaintiff's request for quotation was in the form of perfectly white crystals and was worth $30 per pound, but defendant's agent in accepting thought he was asked for the price of, and meant to give the price of, the calcine or powder form of the article, which contained exactly the same chemical ingredients and was worth about $10 per pound. The article designated by the plaintiff was known to the defendant's agent as "thiocol." Defendant offered to furnish the calcine form of the article, which plaintiff refused to accept; and the defendant refused to supply the higher priced article. In an action for damages for refusal to supply the latter article, it was held that the plaintiff should recover, on the ground that there was no evidence that there was any mutual mistake of the parties. Greenbaum and Smith, JJ., dissented on the ground that plaintiff knew, or ought to have known, that the defendant did not intend to offer to sell the article worth $30 per pound.

The making of an offer creates a legal power in the offeree.[2] Whether certain acts operate as an offer and create such a power depends upon the reasonable interpretation of these acts. It does not depend upon the secret intent of the person doing the acts. If they have reasonably created the impression that he is willing to assume a particular legal duty, the offeree has a power to create such a duty by acceptance. This is the law because it accords with the prevailing notions of justice and public policy, the mores of society. Not only is the existence of a power of acceptance thus determined; the content and limitations of the power are determined by the same standard.[3] At present society simply asks: Did the acts of the offeror lead the offeree reasonably to believe that he could impose (or what is the same thing, that the offeror was willing to assume) the particular duty in question, at the time of the acceptance? If such acts did reasonably lead the offeree so to believe, society, because it believes that justice

[1] (1920) 192 App. Div. 686, 183 N. Y. Supp. 431.

[2] Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169, 171, 181; 1 Williston, Contracts (1920) 31.

[3] See Corbin, *op. cit.*, at p. 183: "The rules of contracts, like all other rules of law, are based upon mere matters of policy, or belief as to policy." *American Water Softener Co. v. United States* (1915) 50 Ct. Cl. 209; *Mansfield v. Hodgdon* (1888) 147 Mass. 304, 17 N. E. 544 (specific performance decreed).

requires it, decrees the existence of the power.[4] In the principal case an offer was in fact made and there was a power, and the question was as to its character and extent. The offeree could impose a duty to deliver some article; but what article? Manifestly, this is a question of fact;[5] and it is to be answered by applying the standard of the reasonably prudent man placed under the same, or similar, circumstances. The article that such a man would have believed he was being offered is the article that the defendant is under a duty to deliver.[6]

Tested by these considerations, what should have been the result in the principal case?

The defendant's language, literally construed, was an offer to sell 100 pounds of "potassium guaiacol sulphonate, C. P. white" at $10.50 per pound. If a reasonable man, situated as plaintiff was, would have believed that the defendant was willing to assume a duty to deliver the chemical worth $30 a pound for the price of $10.50 per pound, then the plaintiff had a power to impose upon the defendant a duty to deliver that chemical at that price; otherwise not. A jury should have been required to ascertain whether a reasonable basis for such belief existed.[7]

It will be observed that this test does not make the offer dependent upon the secret intent of the offeror. The law relating to offer in contract looks at the acts of the offeror and considers the impression which these acts should reasonably make upon the mind of the offeree under the existent circumstances. The offeror's words will not, of course, be literally or technically construed, unless such literal or technical construction would be the reasonable one under the circumstances.[8] The circumstances include the knowledge which the offeree has, or ought to have.[9]

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[4] *Carnegie Steel Co. v. Connelly* (1916, Sup. Ct.) 89 N. J. L. 1, 97 Atl. 774; *Embry v. Hargadine Dry Goods Co.* (1907) 127 Mo. App. 383, 105 S. W. 777; *Phillips v. Gallant* (1875) 62 N. Y. 256, 264.

[5] *Parker v. South Eastern Ry.* (1875) L. R. 2 C. P. 416, 423, 426.

[6] Anson, *Contract* (Corbin's ed. 1919) 32, note. *Parker v. South Eastern Ry. supra*, at pp. 423, 425; *Cargill Commission Co. v. Mowery* (1916) 99 Kan. 389, 161 Pac. 634; *Taplin & Rowell v. Clark* (1915) 89 Vt. 226, 95 Atl. 491; *Rupley v. Daggett* (1874) 74 Ill. 351; *Tyra v. Cheney* (1915) 129 Minn. 428, 152 N. W. 825; *Grant Marble Co. v. Abbot* (1910) 142 Wis. 279, 124 N. W. 264 (rescission denied); *Coates & Sons v. Buck* (1896) 93 Wis. 128, 67 N. W. 23.

[7] If the jury should find that the plaintiff was not reasonable in believing that the defendant was offering the crystalline form of the chemical, but that the reasonable belief was that the calcine or powdered form was offered, instead of the plaintiff's having a right to delivery of the crystalline form, he would be under a duty to take the powder form. *Parker v. South Eastern Ry., supra* note 5; *Neill v. Midland* (1869, Ch.) 20 L. T. 864, 17 W. R. 871; *Buck v. Equitable Life Assur. Soc.* (1917) 96 Wash. 683, 165 Pac. 878.

[8] Corbin, *op. cit.* note 2, at p. 177.

[9] Anson, *Contract* (Corbin's ed. 1919) 213, note 2. *Goddard v. Jeffreys* (1882, Ch.) 45 L. T. 674, 30 W. R. 270; *Neill v. Midland Ry., supra* note 7; *Buck v. Equitable Life Assur. Soc., supra* note 7.

It has often been recognized by courts of equity in similar cases, where there were otherwise the usual grounds to decree specific performance, that it was very hard and unconscionable to insist on the performance of a contract, even though the words of the parties taken out of their setting, namely, all the surrounding circumstances, indicated a meeting of the minds. In such cases, equity has often remitted the parties to such remedies as the law would give, on the ground that specifically enforcing the bargain would be harsh.

Such a case was *Webster v. Cecil.*[10] Webster first offered Cecil £2,000 for certain parcels of land, the offer being refused. Cecil later wrote making an offer to sell the land for £1,100, which Webster accepted by return mail. Cecil meant to offer the land for £2,100, but made an error in adding the valuations he had put on the parcels separately. This error he attempted to correct as soon as he discovered it. Specific performance was refused on the ground that the mistake had been clearly proved; and the plaintiff was remitted to such action as he might be advised to bring at law.[11]

Some courts, however, have even gone so far as to grant equitable relief where, according to accepted theories, there was a valid contract. Thus, in *St. Nicholas Church v. Kropp,*[12] where a builder had sub-

[10] (1861,Ch.) 30 Beav. 62.

[11] It seems that a more substantial basis for refusing the relief asked in this case would have been that there was no contract to be enforced. On this ground likewise damages would not be recoverable at law. It is interesting to speculate as to why the equity courts, until recent times, rather consistently fail to avail themselves of this apparently more solid ground upon which to deny relief in such cases. It may be that, because the law relating to offer and acceptance is of comparatively recent development, this ground for denying relief, if "more solid," was less obvious to courts of equity seventy-five years ago than now. Or it may be that in the earlier cases equity was but tacitly acknowledging that its adjudication that no contract existed would not make that fact *res adjudicata* so as to prevent an action at law. In either event the later cases have somewhat blindly followed the practice in the earlier. For similar cases denying equitable relief and remitting to legal remedies, see *Chute v. Quincy* (1892) 156 Mass. 189, 30 N. E. 550; *Mansfield v. Sherman* (1889) 81 Me. 365, 17 Atl. 300; *Burkhalter v. Jones* (1884) 32 Kan. 5, 3 Pac. 559. In the latter case the court, at page 13, used this language: "In strict law, and by the words of the letters of the parties, we think the parties made a contract; but we also think that in fact and in equity the minds of the parties never came together; that they never really agreed to the same thing; and therefore in equity and good conscience, they did not make a contract, or at least they did not make such a contract as equity should adjudge to be specifically enforced." The writer does not maintain that specific performance should always be decreed in cases similar to *Webster v. Cecil,* if there is a contract for the breach of which a court of law would give damages. But it is believed that, in this class of cases, the number of instances where the plaintiff would recover damages, when equity had refused him specific performance, would be surprisingly small.

[12] (1916) 135 Minn. 115, 160 N. W. 500. See also *Board of School Com'rs v. Bender* (1904) 36 Ind. App. 164, 72 N. E. 154; *contra, Steinmeyer v. Schroeppel* (1907) 226 Ill. 9, 80 N. E. 564. Specific performance, however, is very often decreed where there is a unilateral mistake unknown to the other party; *Goddard*

mitted a bid for the erection of a church, which had been accepted, it was held that the fact, unknown to the church committee, that the builder omitted to include in his estimate the structural steel for the building, justified the court in releasing the bidder where the other party had not materially changed its position, the bidder, as the court said, being free from negligence resulting in the mistake.

One of the leading law cases on this subject is *Smith v. Hughes.*[13] The plaintiff applied to defendant, a race horse trainer, to know if he wanted to buy oats and, receiving a reply that he was always ready to buy good oats, exhibited a sample and stated that he had 40 or 50 quarters of the same oats to sell at 35s per quarter. Defendant took the sample and wrote the next day that he would take the whole quantity at 34s per quarter. Plaintiff sent some of the oats, which were refused because they were not old oats. The parties had not in terms mentioned old oats; but the price offered was high for new oats, and more than a prudent man would have given. Plaintiff knew defendant was a race horse trainer, but was not aware of the fact that such trainers never used new oats if old could be had. In an action for damages for refusal to take the oats, it was held error to instruct the jury that the plaintiff could not recover if plaintiff believed that the defendant "believed or was under the impression that he was "contracting for the purchase of old oats."

Justice Cockburn based his opinion on the ground that "the passive "acquiescence of the seller in the self-deception of the buyer will not "entitle the latter to avoid the contract." Justice Blackburn said that "there is no legal obligation on the vendor to inform the purchaser "that he is under a mistake, not induced by the act of the vendor;" and that the direction did not call attention to "the distinction between "agreeing to take the oats under the belief that they were old, and "agreeing to take the oats under a belief that the plaintiff contracted "that they were old." Only in the latter case, he thought, should the defendant recover. Hannen, J., said that the defendant should not have judgment unless the jury find, "not merely that the plaintiff believed "the defendant to believe that he was buying old oats, but that he "believed the defendant to believe that he, the plaintiff, was contracting "to sell old oats."

It seems to be assumed by all the judges that actual belief or knowledge of the parties is controlling. It would seem more nearly correct to say that the plaintiff's offer creates in the offeree a power to impose such a duty on the offeror as a reasonably prudent man would believe the offeror to have offered to assume.[14] If such a man would have

v. Jeffreys, supra note 9; *Phillip v. Gallant, supra* note 4; *Mansfield v. Hodgdon, supra* note 3.

[13] (1871) L. R. 6 Q. B. 597.

[14] See note 6, supra. In *Tyra v. Cheney,* where the acceptor had not induced the mistake, Holt, J., said: "One cannot snap up an offer or bid knowing that

understood reasonably from the very high price put on the oats, that old oats were being offered, a power to create a duty to deliver such oats should be held to have existed. The same conclusion should follow from the mere offer to sell oats, if it is so well known that race horse trainers use only old oats that a reasonably prudent man would think that only old oats would be offered. What such a man would understand determines what power is created, and the question is one of fact.

In this case of the oats the defendant made a counter-offer. The power he thus created is that which the jury finds would have been understood by a reasonably prudent man under the circumstances, among which are the very important facts that the oats were offered to one who never buys new oats if old can be had,[15] and at a price which no prudent man would pay for new oats. The judges all seem to assume that, so far as the existence of the defendant's belief that he was originally offered old oats is concerned, the plaintiff has been passive, i. e., has done nothing to induce that belief. It seems clear that this is incorrect in view of the facts above referred to, namely, putting on of a price not reasonable for new oats and offering to sell to one who generally is not in the market for such oats.

It seems questionable whether it is useful to attempt to apply the distinction suggested between a belief formed where the offerer is said to be passive and one formed where the offeror is said to have induced it.[16]

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it was made in mistake." This simply means that the offeree does not acquire that power which the offeror's language purports to confer on him, because he has not sufficient reason to believe that the offeror is willing to assume the duty indicated by his words. But see *Southbridge Roofing Co. v. Providence Cornice Co.* (1916) 39 R. I. 35, 97 Atl. 210.

[15] Whether the offeree, or a reasonably prudent man, would think that the offer is to purchase only old oats when a sample has been shown and priced to him with a view to sale, will be dependent, assuming of course no actual knowledge in the offeree, upon the generality of knowledge that race horse trainers want only old oats if they can get them, and upon the scarcity in the market of old oats. If old oats are known to be very scarce, the race horse trainer may not, from the mere fact of offer, reasonably believe that the price named is for old oats.

In *Greene v. Bateman* (1846, C. C. D. R. I.) Fed. Cas. No. 5762, Woodbury, C. J., said: "If one agreed to $3.25 per bunch, and the other to $3.25 per thousand, only half as high a price, there was in truth no contract, as it takes two, we all know, both in fact and in law, to make a contract. Had nothing been said as to bunches or thousands, and the sale was of shingles at $3.25, it might be presumed that the parties meant per thousand, as it was shown to be usual to sell by the thousand at Providence; and it surely would be so presumed if a knowledge of this usage had been brought home to the plaintiff, or if he as well as the defendant had resided at Providence, and thus been likely to know and conform to the usage."

[16] Such cases would be extremely rare, if existent at all, for the reason that a power, in the law of contract, cannot be created, an offer cannot be made, by merely remaining passive. There must be human action.

The question always is: What belief is reasonably induced, or ought to be induced.[17]

The same test applies, after we have determined what power in the offeree has been created, as to whether *that* power has been exercised. Here, as in the case of the offer, the secret intent of the offeree does not control, because, as we have seen, contracts are not made by, nor are they consequent upon, actual intents and consents. If, under all the existent circumstances, a reasonably prudent man would believe that in acting the offeree was exercising the power created by the offer, a contract results. Here again the question is one of fact.[18]

It is admitted that some of the older sales cases applying the doctrine of *caveat emptor* would not square with the view here maintained. The fact, however, that many of those decisions shock our sense of justice is one reason why we should cease to apply that doctrine in such cases. Where the application of that doctrine does not seem harsh, the above views as to the controlling considerations, views applicable to contract relations in general, will, it is believed, explain the decisions.

H. W. A.

TAXATION OF FOREIGN CORPORATIONS

In the recent case of *Underwood Typewriter Co. v. Chamberlain* (1920, U. S.) 41 Sup. Ct. 45, the Supreme Court of the United States dealt with a new application of the principles governing state taxation of foreign corporations. A Connecticut statute levied a tax of two per cent on that proportion of the "net income" of a foreign corporation which the fair cash value of the tangible real and personal property in the state bore to the fair cash value of all the corporate property. A Delaware corporation, with its principal manufacturing plant in Connecticut, contested the tax as unconstitutional and showed that by this method of apportionment the tax was levied upon forty-seven per cent of its net income, which was much more than the actual amount of income derived from "business in Connecticut." The company's net receipts in other states were over $1,000,000 and in Connecticut only about $42,000; while under the method of apportionment fixed by the statute a tax was levied on a sum in excess of $600,000. The

[17] See authorities cited in note 6, *supra.*

[18] In *Johnson Fish Co. v. Hawley* (1912) 150 Wis. 578, 582, 137 N. W. 773, 775, referring to plaintiff's alleged acceptance, which was ambiguous and which had not been treated as an acceptance, the court said: "If it be true that respondent did not mean to convey such an idea; but used language leading Mr. Hawley, in the exercise of ordinary care, to suppose it did, it must bear the burden of its fault. He had a right to act upon the meaning which respondent's words conveyed to him, if such, reasonably, might be the meaning an ordinarily careful person would read out of such language under the same or similar circumstances." See also *Vanleer v. Fain* (1845, Tenn.) 6 Humph. 104; *Kendall v. Boyer* (1909) 144 Iowa, 303, 122 N. W. 941; *Clark v. Maisch* (1920, Wis.) 177 N. W. 11.